(3)

No. 02-1409

Supreme Court, U.S.
FILED
JUN 9 - 2003
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 2002

CABLE CAR ADVERTISERS, INC., DBA
CABLE CAR CHARTERS,
a California Corporation,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
and
FREIGHT CHECKERS, CLERICAL EMPLOYEES &
HELPERS LOCAL 856,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO,
Intervenor

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI

LAWRENCE ALIOTO
465 California Street
Suite 822
San Francisco, Ca. 94104
(415) 399-0533
Counsel for Petitioner

PACIFIC FINANCIAL PRINTING • 4020 CAMPBELL AVENUE • MENLO PARK, CA 94025 • (650) 328-1500

8 PP

TABLE OF CONTENTS

		Page
1.	Where Cable Car Entered into a Labor Agreement with Local 856 at the End of 1993, No Weight at All Should be Accorded the 1993 Violations in Deciding Allegations of Post-1993 Violations of the Act	1
2.	ALJ Schmidt Found as a Fact that Palewicz was Unable to Drive on Fridays, Saturdays, and Sundays in 1993	4
3.	Mozol's Damages Should be Retried	5
4.	Conclusion.....	5

TABLE OF AUTHORITIES

Cases

	Page
88 Transit Lines, Inc. v. NLRB 55 F.3d 823 (3rd Circuit 1995)	1
H.C. Macaulay Foundry Co. v. NLRB 553 F.2d 1198 (9th Circuit 1977)	1
NLRB v. International Union of Operating Engineers, Local 925, 460 F.2d 589 (5th Circuit 1972)	4
Paramount Cap Mfg. Co. v. NLRB 280 F.2d 109, 112 (8th Circuit 1958)	4

1. Where Cable Car Entered into a Labor Agreement with Local 856 at the End of 1993, No Weight at All Should be Accorded the 1993 Violations in Deciding Allegations of Post-1993 Violations of the Act.

88 Transit Lines, Inc. v. NLRB 55 F.3d 823 (3rd Cir. 1995) and H.C. Macaulay Foundry Co. v. NLRB 553 F.3d 1198 (9th Cir. 1977) both involved what might be termed on-going or continuing violations of the Act. A certain bus route was discontinued. A particular employee was blacklisted. But Cable Car's 1993 violations against the reduced-hours employees were not on-going and not continuing. In the underlying proceedings before Judge Schmidt, Bishop testified that all eight of the promotions he was to drive in late July 1993 were abruptly cancelled, and that overall his assignments dropped off in 1993 (Excerpts, p. 18)("Excerpts, p. 18" is 322 NLRB at p. 571). Gleffe testified that after she joined in leafleting the company, her schedule as a ticket seller was reduced first by one day a week, then by two days a week (Excerpts, p. 17). Horning testified that after the Board election (June 17, 1993 - Excerpts, p. 5), all of the August promotions he was scheduled to drive were, he was told, cancelled (Excerpts, p. 18). Lambert wore her union pin to work on May 6, 1993 and the following day, she testified, her assignment as a shuttle driver was cancelled (Excerpts, pp. 12-13). McKenzie testified that his work as a ticket seller was reduced, he was told that because the Union was in he was out, and that he saw a newly hired replacement doing his work (Excerpts, p. 17). Miles testified that after the election her steady tour schedule ended abruptly and that her July and August 1993 promotion assignments were cancelled (Excerpts, pp. 18-19), although it is true that the Region proposed no damages for Miles for 1993 (Excerpts, p. 44), because in 1993 Miles drove a greater percentage of total driver-hours than she had in the base year

of 1992 (Excerpts, pp. 71-72). Telles testified that after participating in handbilling at Pier 41, his hours were cut drastically (Excerpts, p. 19). Trulock testified that after the Board election, 11 promotions he was scheduled to drive were cancelled (Excerpts, p. 19).

The appendices to the Second Amended Compliance Specification and Notice of Hearing, being the governing compliance specification in the case, show the following (April 1, 2002, Excerpts of Record in the Ninth Circuit, 01-71733, p. 34 and following):

Year	Quarter	Bishop	Gleffe	Horning	Lambert
1994	1		917.49	830.72	
	2		1,611.39	968.13	
	3	992.61			
	4	429.91		104.03	
1995	1				
	2				
	3		420.57	826.46	
	4			501.79	
1996	1				
	2		1,695.93	634.95	
	3		1,336.13		
	4		616.53		
1997	1				
	2		706.37		
	3				
	4				
1998	1				
	2				
	3				
	4				950.00
1999	1				
	2				
	3				
	4				

Year	Quarter	McKenzie	Miles	Telles	Trulock
1994	1				
	2	1,272.93			
	3		1,346.91		1,578.45
	4				1,457.75
1995	1				2,305.78
	2				2,992.87
	3		457.05	5,058.56	377.59
	4		1,997.86		417.83
1996	1				
	2				965.64
	3		581.60		1,971.52
	4		979.79		
1997	1		152.35		
	2				4,268.01
	3		605.94		836.75
	4		2,340.65		151.66
1998	1				43.66
	2		1,783.19		1,881.76
	3		2,084.43		1,841.53
	4				
1999	1		3,213.20		
	2		4,886.98		
	3		2,029.74		
	4		2,809.10		

From this evidence it is clear that the 1993 violations were not the cause of the post-1993 damages. The foregoing post-1993 amounts are recoverable as damages only upon proof of new post-1993 violations of the Act. The General Counsel's evidence consisted of a showing that in the above-referenced quarters the discriminatees in question worked fewer hours than at least one less senior employee. That might be the result of illegal discrimination and it might not. There is nothing in the record to tip the

scales in favor of discrimination. Yet damages were awarded exactly as appears above, except the last few quarters for Miles and Trulock.

The 1993 violations must not be considered for this purpose, NLRB v. International Union of Operating Engineers, Local 925, AFL-CIO et al. 460 F.2d 589, 594-602 (5th Cir. 1972), especially where Cable Car entered into a labor contract with Local 856 at the end of 1993, Paramount Cap. Mfg. Co. v. NLRB, 280 F.2d 109, 112 (8th Cir. 1958).

Palewicz testified about Palewicz, Buckey about Buckey. This testimony, even fully credited, does not tend to prove the post-1993 discriminations here alleged.

The Board's Brief in Opposition ignores the absence of a discrimination-based grievance under the contract in all the post-1993 period (R.T. 268-269). It does not address the fact that none of the foregoing eight claimants testified in this backpay proceeding. It dismisses as incredible the uncontradicted evidence of Cable Car's agents that Cable Car adhered to the contract's rule of seniority in assigning work in the post-1993 period (R.T. 327; 368; 493; 587; 590; 626-628; 946-948).

The ALJ's decision in this case, adopted by the Board and enforced by the Ninth Circuit, is in the books. It squarely conflicts with the correct decision of the Fifth Circuit on the same subject in Operating Engineers, supra, 460 F.2d at 598-602.

2. ALJ Schmidt Found as a Fact that Palewicz was Unable to Work on Fridays, Saturdays, and Sundays in 1993.

ALJ Schmidt found; "About 2 or 3 days after the election, Hoa Van telephoned Palewicz to inform him that his schedule had been changed to Friday, Saturday, and

Sunday, days which Palewicz could not drive." Excerpt, pp. 17-18; 322 NLRB at p. 570. In fixing Palewicz's damages for 1993 ALJ Pollack disregarded this finding (A-32-33). Palewicz's damages should be retried.

3. Mozol's Damages Should be Retired.

According to Agent Karen Thompson's notes, Mozol moved to Wisconsin at the beginning of 1994 (notes attached to Cable Car's Opening Brief in the Ninth Circuit, No. 01-71733, April 1, 2002). Mozol was awarded damages for the period up to January of 1998 (Excerpts 67-86). His move to Wisconsin was never communicated to ALJ Pollack and therefore was not addressed in the decision of this case. Upon a proper hearing the ALJ may have reduced Mozol's damages because of the move.

CONCLUSION

This Court should grant Cable Car's Petition for Certiorari. The decision of the Ninth Circuit should be reversed insofar as that decision enforces the Board's order requiring Cable Car to pay post-1993 backpay to Bishop, Gleffe, Horning, Lambert, McKenzie, Miles, Telles and Trulock and insofar as that decision enforces the awards to Palewicz and Mozol. The awards to Palewicz and Mozol should be retried.

Respectfully,

Lawrence Alioto

Attorney for Petitioner
Cable Car Advertisers, Inc.,

June 6, 2003